

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

SEAN PATRICK GILMORE,

Plaintiff,

V.

CAROLYN W. COLVIN, Acting
Commissioner of the Social Security
Administration.

Defendant.

CASE NO. 2:15-cv-01862 JRC

ORDER ON PLAINTIFF'S
COMPLAINT

This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and Local Magistrate Judge Rule MJR 13 (*see also* Notice of Initial Assignment to a U.S. Magistrate Judge and Consent Form, Dkt. 5; Consent to Proceed Before a United States Magistrate Judge, Dkt. 6). This matter has been fully briefed (*see* Dkt. 10, 11, 12).

After considering and reviewing the record, the Court concludes that the ALJ erred when evaluating the medical evidence. He failed to include into the residual

1 functional capacity plaintiff's need for occasional oversight in order to stay on task and
2 failed to explain adequately why this limitation was not adopted.

3 Therefore, this matter is reversed and remanded for further administrative
4 proceedings pursuant to sentence four of 42 U.S.C. § 405(g) to the Acting Commissioner
5 for further consideration consistent with this order.

6 BACKGROUND

7 Plaintiff, SEAN PATRICK GILMORE, was born in 1968 and was 37 years old on
8 the alleged date of disability onset of December 31, 2005 (*see* AR. 99-105). Plaintiff left
9 school in the tenth or eleventh grade and has not obtained his GED (AR. 685). Plaintiff
10 has work experience as a telephone solicitor, warehouse worker, and truck driver (AR.
11 123-30, 706-07).

13 According to the ALJ, plaintiff has at least the severe impairments of "anxiety
14 related disorders (general anxiety disorder, post-traumatic stress disorder, panic);
15 affective related disorders (mood disorder versus depression); personality disorder; and
16 substance abuse disorder (20 CFR 416.920(c))" (footnote omitted) (AR. 656).

17 At the time of the last hearing, plaintiff was living with his parents (AR. 688).

18 PROCEDURAL HISTORY

19 Plaintiff's application for Supplemental Security Income ("SSI") benefits pursuant
20 to 42 U.S.C. § 1382(a) (Title XVI) of the Social Security Act was denied initially and
21 following reconsideration (*see* AR. 47-50, 52-53). The appeal before this Court follows
22 three prior hearings (*see* AR. 21-44, 358-89, 679-715); two prior decisions determining
23 that plaintiff was not disabled (*see* AR. 8-20, 337-57); two prior Appeals Committee

1 Denials (see AR. 1-3, 403-05); and two remands from the district court (see AR. 406-09,
2 772-87). Plaintiff's most recent hearing was held before Administrative Law Judge
3 Larry Kennedy ("the ALJ") on July 28, 2014 (see AR. 678-715). On January 5, 2015, the
4 ALJ issued a written decision in which the ALJ concluded that plaintiff was not disabled
5 pursuant to the Social Security Act (see AR. 651-77).

6 Plaintiff raises the following issues: (1) Did the ALJ reasonably evaluate the
7 medical opinions of state agency medical consultant Thomas Clifford, Ph.D. and
8 examining doctor Carl Epp, Ph.D.; and (2) Did the ALJ reasonably find plaintiff could do
9 other work that existed in significant numbers in the national economy (see Defendant's
10 Brief, Dkt. 11, p. 1).

12 STANDARD OF REVIEW

13 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's
14 denial of social security benefits if the ALJ's findings are based on legal error or not
15 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d
16 1211, 1214 n.1 (9th Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.
17 1999)).

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DISCUSSION

(1) Did the ALJ reasonably evaluate the medical opinions of state agency medical consultant Thomas Clifford, Ph.D. and examining doctor Carl Epp, Ph.D.?

a. Non-examining doctor, Dr. Thomas Clifford, Ph.D.

Plaintiff contends that the ALJ erred when evaluating the medical opinion of non-examining State agency medical consultant, Dr. Thomas Clifford, Ph.D. (*see* AR. 665-66). Defendant contends that the ALJ did not commit harmful error when evaluating Dr. Clifford's opinion because Dr. Clifford's opinion regarding a limitation to occasional extra oversight is only a recommendation and not an opinion about what conditions plaintiff required in order to be able to perform work activity (*see* Dkt. 11, pp. 5-6). Defendant contends that "the occasional need for oversight simply illustrates an environment in which plaintiff would work best" (*id.*).

According to Social Security Ruling 96-6p, state agency medical consultants, while not examining doctors, “are highly qualified physicians and psychologists who are experts in the evaluation of the medical issues in disability claims under the Act.” SSR 96-6p, 1996 LEXIS 3 at *4. Therefore, regarding state agency medical consultants, the ALJ is “required to consider as opinion evidence” their findings, and also is “required to explain in his decision the weight given to such opinions.” *Sawyer v. Astrue*, 303 Fed. Appx. 453, *455, 2008 U.S. App. LEXIS 27247 at **2-**3 (9th Cir. 2008) (citing 20 C.F.R. § 416.927(f)(2)(i)-(ii); SSR 96-6p, 1996 SSR LEXIS 3, *5) (memorandum opinion) (unpublished opinion). The ALJ “may reject the opinion of a non-examining physician by reference to specific evidence in the medical record.” *Sousa v. Callahan*,

1 143 F.3d 1240, 1244 (9th Cir. 1998) (*citing Gomez v. Chater*, 74 F.3d 967, 972 (9th Cir.
2 1996)); *Andrews, supra*, 53 F.3d at 1041).

3 Dr. Clifford reviewed plaintiff's records on October 29, 2007 (AR. 226). He
4 opined, among other opinions, that plaintiff "is capable of sustain[ing] two-hour intervals
5 of productive activity over an eight-hour day with occasional extra oversight to keep him
6 on task" (*id.*). Although the ALJ found that the limitation to occasional extra oversight
7 was an opinion regarding "the conditions under which the claimant would function best,"
8 (AR. 665-66), the record instead demonstrates that Dr. Clifford provided an opinion
9 regarding what condition plaintiff would need in order to "keep him on task" (AR. 226).
10 However, this opinion from Dr. Clifford was not included into plaintiff's residual
11 functional capacity ("RFC") or in the hypothetical presented to the vocational expert
12 ("VE").

14 According to Social Security Ruling ("SSR") 96-8p, a RFC assessment by the ALJ
15 "must always consider and address medical source opinions. If the RFC assessment
16 conflicts with an opinion from a medical source, the adjudicator must explain why the
17 opinion was not adopted." *See SSR 96-8p*, 1996 SSR LEXIS 5 at *20. Although "Social
18 Security Rulings do not have the force of law, [n]evertheless, they constitute Social
19 Security Administration interpretations of the statute it administers and of its own
20 regulations." *See Quang Van Han v. Bowen*, 882 F.2d 1453, 1457 (9th Cir. 1989) (*citing*
21 *Paxton v. Sec. HHS*, 865 F.2d 1352, 1356 (9th Cir. 1988); *Paulson v. Bowen*, 836 F.2d
22 1249, 1252 n.2 (9th Cir. 1988)) (internal citation and footnote omitted). As stated by the
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1 Ninth Circuit, “we defer to Social Security Rulings unless they are plainly erroneous or
 2 inconsistent with the [Social Security] Act or regulations.” *Id.* (*citing Chevron USA, Inc.*
 3 *v. NRDC, Inc.*, 467 U.S. 837, 842-45 (1984); *Paxton, supra*, 865 F.2d at 1356)) (footnote
 4 omitted). Although the ALJ found that the opinion by Dr. Clifford that plaintiff “needed
 5 occasional extra oversight to keep him on task [is not] supported by the
 6 longitudinal record,” the ALJ did not adequately “explain why [this] opinion was not
 7 adopted.” *See* SSR 96-8p, 1996 SSR LEXIS 5 at *20; *Sousa, supra*, 143 F.3d at 1244 (to
 8 reject the opinion of a non-examining doctor, the ALJ should reference “specific
 9 evidence in the medical record”) (*citing Gomez, supra*, 74 F.3d at 972).
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11 It is clear that Dr. Clifford opines that plaintiff only can sustain two hour intervals
 12 of productive activity if he has “occasional oversight to keep him on task” (AR. 226).
 13 Therefore, the ALJ’s finding to the contrary is not a finding based on substantial evidence
 14 in the record as a whole. *See Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir.
 15 2005). Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner’s
 16 denial of social security benefits if the ALJ’s findings are not supported by substantial
 17 evidence in the record as a whole. *Id.* (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.
 18 1999)).
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20 According to the Ninth Circuit, when an ALJ ignores or improperly discounts
 21 significant and probative evidence in the record favorable to a claimant’s position, the
 22 ALJ “thereby provide[s] an incomplete residual functional capacity [RFC]
 23 determination.” *See Hill v. Astrue*, 698 F.3d 1153, 1161 (9th Cir. 2012). Furthermore,
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1 when the RFC is incomplete, the hypothetical question presented to the VE relied on at
2 step five necessarily also is incomplete, “and therefore the ALJ’s reliance on the
3 vocational expert’s answers [is] improper.” *See id.* at 1162.

4 This reasoning explains why the error is not harmless. Because the RFC is
5 incomplete and the hypothetical question presented to the VE also is incomplete, it is
6 unclear what effect including this limitation of required occasional extra oversight to
7 keep plaintiff on task would have on plaintiff’s ability to perform work activity. *See*
8 *Marsh v. Colvin*, 792 F.3d 1170, 1173 (9th Cir. July 10, 2015) (“ALJ errors in social
9 security are harmless if they are ‘inconsequential to the ultimate nondisability
10 determination’ and that ‘a reviewing court cannot consider [an] error harmless unless it
11 can confidently conclude that no reasonable ALJ, when fully crediting the testimony,
12 could have reached a different disability determination’”) (*citing Stout*, 454 F.3d at 1055-
13 56). Unfortunately, the proper hypothetical question was not presented to the VE in order
14 to evaluate whether or not this would result in a finding that plaintiff was disabled under
15 the Act. Because the Court cannot conclude with confidence “that no reasonable ALJ
16 when fully crediting the [opinion from Dr. Clifford] could have reached a different
17 disability determination,” the ALJ’s error is not harmless. *See id.*

19 However, this reasoning also demonstrates why this matter should be reversed and
20 remanded for additional proceedings rather than with a direction to award benefits. The
21 VE testified that “if you need somebody to keep you on task all the time,” you would be
22 replaced, but Dr. Clifford did not opine that plaintiff would need oversight “all the time”;
23 he opined that plaintiff would need occasional oversight (*see* AR. 712-13). The effect of

1 the limitation of required occasional extra oversight is not clear. Therefore, for this
 2 reason, and for reasons discussed below with respect to the lack of medical opinion
 3 evidence relied on by the ALJ and the possibility of the materiality of substance abuse,
 4 *see infra*, section 1.b, further administrative proceedings following remand of this matter
 5 would serve a useful purpose. *See Treichler v. Comm'r of Soc. Sec. Admin.*, 775 F.3d
 6 1090, 1105 (9th Cir. 2014) (citations omitted) (remand with a direction to award benefits
 7 is not appropriate if further administrative proceedings would serve a useful purpose).
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9 According to the Ninth Circuit, when making the determination about remanding
 10 for benefits, the Court must review the record as a whole and determine if it is fully
 11 developed, is free from conflicts and ambiguities, and “all essential factual issues have
 12 been resolved.” *Id. at 1101* (citations omitted). Here, the effect of the required limitation
 13 of occasional oversight on plaintiff’s ability to perform work activity has not been
 14 resolved, representing one of the ambiguities that remain. The Court should not remand
 15 for benefits if it is not clear from the record that the ALJ would be required to find
 16 plaintiff disabled were the inappropriately discredited evidence credited in full. *See*
 17 *Harman, supra*, 211 F.3d at 1178 (*quoting Smolen, supra*, 80 F.3d at 1292).
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19 The Court also notes that the ALJ found that Dr. Clifford, when using the term
 20 “occasional,” did not intend to use this term as normally used in the Social Security
 21 context, even though he is a “highly qualified [] [] psychologist[] who [is an] expert[] in
 22 the evaluation of the medical issues in disability claims under the Act.” SSR 96-6p, 1996
 23 LEXIS 3 at *4; (*see AR. 666* (“Dr. Clifford used this term as it is commonly defined”)).
 24 The ALJ relied on the fact that if “Dr. Clifford had intended the term occasional as used

1 in this portion of the opinion to mean up to one-third of the time, this would have resulted
2 in the State agency finding the claimant disabled as it would suggest a supported work
3 environment; [h]owever, the claimant was found not disabled" (AR. 666). This suggests
4 that the ALJ found this aspect of Dr. Clifford's opinion to be ambiguous. However, if this
5 opinion by Dr. Clifford is ambiguous, then the ALJ has a duty to develop the record on
6 this matter. *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001) (the ALJ "has an
7 independent 'duty to fully and fairly develop the record and to assure that the claimant's
8 interests are considered'") (*quoting Smolen v. Chater*, 80 F.3d 1273, 1288 (9th Cir. 1996)
9 (*quoting Brown v. Heckler*, 713 F.2d 411, 443 (9th Cir. 1983) (per curiam))).
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11 **b. Examining doctor, Dr. Carl Epp, Ph.D.**

12 Plaintiff contends that the ALJ erred when rejecting the medical opinion of Dr.
13 Epp. Defendant contends that there is no error. Plaintiff also contends that the relevant
14 opinions of Dr. Epp are not contradicted.

15 When an opinion from an examining doctor is contradicted by other medical
16 opinions, the examining doctor's opinion can be rejected only "for specific and legitimate
17 reasons that are supported by substantial evidence in the record." *Lester v. Chater*, 81
18 F.3d 821, 830-31 (9th Cir. 1996) (*citing Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir.
19 1995); *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)); *see also* 20 C.F.R. §§
20 404.1527(a)(2) ("Medical opinions are statements from physicians and psychologists or
21 other acceptable medical sources that reflect judgments about the nature and severity of
22 your impairment(s), including your symptoms, diagnosis and prognosis, what you can
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1 still do despite impairment(s), and your physical or mental restrictions"). The ALJ must
2 provide "clear and convincing" reasons for rejecting the uncontradicted opinion of either
3 an examining physician or psychologist. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.
4 1996) (*citing Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988); *Pitzer v. Sullivan*, 908
5 F.2d 502, 506 (9th Cir. 1990)).

6 The ALJ failed to credit fully the opinions of Dr. Epp for multiple reasons,
7 including a heavy reliance on plaintiff's self-reports, which the ALJ found not credible
8 (AR. 668). The ALJ noted Dr. Epp's reference to a "troubling lack of information" when
9 indicating whether or not he had reviewed any records (*see* AR. 638). Plaintiff has not
10 challenged the credibility determination before this Court. In addition, substantial
11 evidence appears to support the finding by the ALJ that Dr. Epp based his opinions
12 largely on plaintiff's self reports. For example, regarding his opinion of the marked effect
13 of plaintiff's post-traumatic stress disorder signs and symptoms on plaintiff's ability to
14 work on January 5, 2010, Dr. Epp indicated that he had not observed these signs and
15 symptoms (*see* AR. 490). Similarly, he indicated that he had not observed symptoms of
16 bipolar disorder, yet noted that plaintiff had not been able to "resolve his bipolar disorder
17 symptoms so far" (*see id.*). Dr. Epp opined that the bipolar symptoms which he did not
18 observe had a severe effect on plaintiff's ability to conduct work activities (*see id.*).
19 Regarding his opinion of marked limitations with respect to the ability to perform routine
20 tasks, Dr. Epp indicated that plaintiff could not tolerate routine "as evidenced by his
21 history" (AR. 492). Similarly, when describing plaintiff's symptoms related to his panic
22 attacks/panic disorder on January 8, 2014, Dr. Epp indicates reliance on plaintiff's
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24 attacks/panic disorder on January 8, 2014, Dr. Epp indicates reliance on plaintiff's

1 statements (*see* AR. 1087 (“he states”)). At this evaluation, Dr. Epps opined that
2 plaintiff’s anxiety disorder “is very severe and almost certainly disabling” (*see* AR.
3 1090).

4 However, as noted by the ALJ, Dr. Epp indicated at his January 8, 2014 evaluation
5 that plaintiff suffered from various marked limitations that were “primarily the result of
6 alcohol or drug use within the past 60 days,” including marked limitations in plaintiff’s
7 ability to perform activities within a schedule, maintain regular attendance, and be
8 punctual within customary tolerances without special supervision; communicate and
9 perform effectively in a work setting; and maintain appropriate behavior in a work setting
10 (*see* AR. 1088-89). The ALJ appears to reject these opinions by Dr. Epp of marked
11 limitations as being the result of drug and alcohol use (*see* AR. 667), however, this calls
12 into question the ALJ’s finding that “substance abuse is not ‘material’” (*see* AR. 656
13 n.1). If these marked limitations result from substance abuse and would result in a finding
14 of disability if credited, it would appear that the substance abuse is material, a finding
15 that has support in the record, as demonstrated by the ALJ’s discussion of the issue
16 throughout his decision. The ALJ found that plaintiff’s substance abuse disorder is a
17 severe impairment (*see* AR. 656).

18 In addition, the Court notes plaintiff’s indication that after rejecting the opinions
19 of the other doctors and other medical sources, “the ALJ has no medical opinion evidence
20 on which to support his decision” (Dkt. 10, p. 12). The ALJ is responsible for resolving
21 ambiguities and conflicts in the medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722
22 (9th Cir. 1998) (*citing Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995)).
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1 Therefore, the Court concludes that the ALJ should evaluate all of the medical evidence
2 anew following remand of this matter. The ALJ appears to rely solely on plaintiff's lack
3 of credibility and not on any medical opinion for his determination regarding plaintiff's
4 RFC and for the ultimate determination regarding disability.

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6 **(2) Did the ALJ reasonably find plaintiff could do other work that existed
in significant numbers in the national economy?**

7 The Court already has touched on this issue when discussing whether or not the
8 error by the ALJ is harmless, *see supra*, section 1. Because this matter is reversed and
9 remanded for further consideration of the medical evidence, the ALJ's finding regarding
10 plaintiff's ability to do other work, as a necessity, must be determined anew following
11 remand of this matter.

12

13 CONCLUSION

14 Based on the stated reasons and the relevant record, the Court **ORDERS** that this
15 matter be **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. §
16 405(g) to the Acting Commissioner for further consideration consistent with this order.

17 **JUDGMENT** should be for plaintiff and the case should be closed.

18 Dated this 3rd day of May, 2016.

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23 J. Richard Creatura
24 United States Magistrate Judge